United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-6076

To be argued by
MARVIN SCHWARTZ

United States Court of Appeals

For the Second Circuit

Docket No. 76-6076

W. J. USERY, Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR,

Appellee,

against

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Appellant

DEFENDANT-APPELLANT'S BRIEF

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Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

Preliminary Statement

This is an appeal from a summary judgment ordering defendant International Organization of Masters, Mates and Pilots ("the Union" or "IOMM&P") to conduct a new referendum election for its three International officers and all of its Offshore Division officers, under the supervision of the Secretary of Labor, to be completed no later than the end of 1976. Jurisdiction of the action is founded in Title IV of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA").

The District Court's Decision to invalidate the 1971 election of the defendant was based solely upon the distribution by the Union of a single piece of literature. Slightly more than a month before that election the IOMM&P was also conducting a separate union-wide referendum on a proposed affiliation with another labor organization, an issue vital to the future direction and perhaps survival of the IOMM&P. In connection with that separate referendum, and a month before the election, the union distributed to its membership a written newsletter (hereinafter affiliation newsletter) which contained third party statements complimentary to the union President (O'Callaghan) for sponsoring the affiliation and derogatory of the stand taken by the principal opponent of affiliation (Sheldon), who also was the rival candidate for President in the forthcoming election. The District Court held that this affiliation newsletter constituted prohibited campaign propaganda, and its distribution invalidated the 1971 election of all three of the International officers and all of the 41 Offshore Division Officers.

Under the IOMM&P Constitution elections of the three International Officers and all of the Offshore Division Officers must be held by referendum every three years; and the next election was held, as required, and nominations for that election began in June 1974 and the ninety day balloting period was finally completed in December of 1974. However, in both the

Presidential and Vice-Presidential races, no candidate received the 40% plurality prescribed by the Constitution as the minimum vote necessary for outright victory. Accordingly, a run-off was held for the top positions, which extended the election until June 1975. The incumbent President (O'Callaghan), the beneficiary of the challenged 1971 affiliation newsletter was defeated in the 1975 run-off. In this 1974-1975 election, the O'Callaghan "slate" lost two of the three International offices; two of the three Offshore Division Vice President offices; and more than two-thirds of the Offshore Division Port Agents.*

The summary judgment motion below was made before completion of the run-off election. After its results became known, plaintiff advised the District Court that he continued to press his motion, and the Court in March 1976 thereafter granted the judgment now on appeal.

The result of the decision below is to compel this union, which has held lengthy and expensive referendum elections in 1974 and 1975, to hold another such election for all offices in 1976. And because the three-year Constitutional term of office extends only from 1974 to 1977, still another election would be required in 1977, the very next year.

The decision below also creates an intolerable uncertainty as to the validity of certain provisions of the IOMM&P Constitution which bear on the officerships of the principal IOMM&P

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* These regular triennial elections, particularly when there (cont.)

*(cont. from p. 3) is a run-off, require great effort and entail enormous expense. Under the applicable Constitution and Offshore Division By-Laws procedures, an International Ballot Committee supervises the entire election process. In order to insure geographical representation to the various national areas involved in these elections, the Constitution requires the Ballot Committee to be composed of members coming from the Atlantic Coast, the Pacific coast and the Gulf coast (in the 1974 election there were five Ballot Committee members). The Ballot Committee is required to function at all stages of the electoral processes from the pre-nomination conferences; to the nominating period; to the preparation and sending out of the ballots; and finally extending through the receipt and counting of the ballots at which time all challenges are made. The Ballot Committee must then sit and hear the challenges and decide them. Traditionally, and under the practice of this Union, the hearings on the challenges are conducted with a stenographic transcript in the nature of a full adversary hearing with representation of the various candidates by their several different attorneys. These hearings alone normally extend over a period of at least a week. During a normal election period, the Ballot Committee will meet on five or six separate occasions and each occasion will be for a substantial period of time. The expenditures incurred on behalf of the Ballot Committee are very considerable but they are mandated by the procedures described in the Union's Constitution and By-Laws and they are deemed necessary to insure confidence in the electoral process.

Under the Constitution, it is also provided that the actual conduct of the count be conducted by an impartial agency. During recent years, the Union has used the American Arbitration Association for this process. Because of the thousands of votes cast; the many different candidates for the various offices; and the election of the large number of convention delegates, the American Arbitration Association must assign a substantial number of persons to the election task. This too represents a considerable expense which is also mandated by the Constitution in the interests of assuring the impartiality and integrity of the election process.

The impartial agency, in this instance the American Arbitration Association, itself engages an independent arbitrator to hear any appeals from any decision of the Ballot Committee. This is in accord with the rules of the American Arbitration Association which have become a part of the electoral customs of the Union. This also represents an additional expense.

The cost of printing the ballot and explanatory material, the evelopes and return envelopes and expenses of mailing are also substantial. Because the election of International officers is accompanied by election of the Offshore Division officers, this involves offices allocated on a port-wide or Division-wide basis,

*(continued) the ballots are not uniform for all members of the International. Special ballots must be prepared. There is one ballot for the International election and a separate ballot for the Division election. A special newspaper supplement must be prepared for distribution to all of the membership. It contains not only the names of the candidates but their photographs and a statement that each candidate is entitled to include on behalf of his candidacy. Thus, the printing costs are far more extensive than would be expected in a simple, uniform ballot for a limited number of offices.

For the 1974-1975 election, the costs for the various items outlined above were as follows:

Printing	$ 26,477.56
Ballot Committee Expense	85,897.33
American Arbitration Association for election and run-off election	130,111.34
Cost of stenographic transcript for Ballot Committee proceeding and American Arbitration Association Arbitrator's proceedings	10,360.05
John Harold, Esq., Attorney for the Ballot Committee	10,000.00
	$262,846.28

(J.A. 1309a-1317; 1348a; 1347a; 1352a; 2062a-2114a; 3082a-3086a)

subdivision, its Offshore Division. Under the IOMM&P and Offshore Division Constitutions, the three elected officers of the International also serve, without pay, as executive and fiscal officers of the Offshore Division. The Secretary of Labor has challenged the validity of these Constitutional provisions, but the judgment below leaves this issue undecided. Thus, the parties, under that judgment, would enter into a supervised election with no indication of the validity of material provisions of the Constitution which have squarely been drawn into issue in this case.

Questions Presented

1. Whether the affiliation newsletter dealing directly and exclusively with another independent 90 day mail ballot referendum being conducted by the Union a month before the election, the timing of which independent referendum is also controlled by the Union's Constitution, constitutes prohibited campaign propaganda because it contains statements by third parties either commendatory or derogatory in response to the positions taken on the independent referendum issue by the principal spokesmen of the two forces (O'Callaghan and Sheldon) who also happen to be presidential opponents in the coming election.

(a) Whether a 1971 temporary injunction, based solely on the affiliation newsletter and issued upon affidavits

and without evidentiary hearing, ordering the Union to distribute counter literature of Sheldon but refusing to stay the election, is collateral estoppel on the issue of whether or not the affiliation newsletter was prohibited campaign propaganda, and therefore foreclosing its consideration by this Court in this action.

2. Whether the Court below having decided by Summary Judgment that the affiliation newsletter violated the governing statute was therefore foreclosed from inquiring into all of the relevant evidence and exercising its sound jurisdictional discretion in determining whether the purposes of the governing statute will be served by (a) requiring a new election under the supervision of the Secretary or (b) rejecting the Union's proposals in its Counter-Judgment and Order that such supervision be of the Union's next regularly scheduled election just one year away.

3. Whether the Court below erred in ordering a new election to be supervised by the Secretary of Labor without deciding the tendered issue as to the validity of the Union's Constitutional provisions making the three duly elected International officers the responsible executive and fiscal officers of the Union's Offshore Division.*

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* Under the Constitution, these three officials have the same responsibilities in other fully formed divisions. This is unchallenged by the Secretary because he has received no complaint from a member.

Statement of the Case

The International Organization of Masters, Mates and Pilots

Some background of the defendant-appellant and the circumstances which led up to its 1971 election will help the Court to understand the Questions Presented in this case.

The IOMM&P is an international labor organization consisting primarily of licensed deck officers serving the American merchant marine. It has approximately ten thousand members residing all over the country. At any given time a large proportion of the membership is serving aboard ship.

Because of the dispersal of its membership, the IOMM&P conducts its most important business by membership referendum; and because of the length of voyages, the referendums extend over a relatively protracted period.

The International officers and the Offshore Division officers of the Union are elected every three years, also by referendum. By constitutional mandate, both elections and non-election referendums must be conducted through an impartial balloting agency. The expense involved is considerable.

The election challenged in this action took place in 1971. This election was the first to be held under the newly structured organization which came into being in October 1970 as a result of a membership referendum that adopted a new

International Constitution which radically altered the internal structure of the Union. Recognizing that this first election would be unusual, it was designated specifically in the new International Constitution to be the "transitional"election,and the period of occupancy of office was to be known as the "transitional term of office." Similar recognition of the unique nature of this first "transitional" election was set forth in the by-laws of the Offshore Division of the Union, which were drafted after the proposed new Constitution received Convention approval, and which came into being also by membership referendum on October 1, 1970.

Prior to 1970, the Union was composed of a number of semi-autonomous Offshore, Inland and Pilots Locals. The great majority of these were the Offshore locals, whose principal offices were in the major ports on the Atlantic, Gulf and Pacific Coasts. The rights, duties and privileges of the members were governed by an International Constitution, as well as by By-Laws of each man's individual local. There were three International officers, a President, Vice-President and Secretary-Treasurer who were elected by all the members of the Union, and Local officials who were elected by the membership of each particular local. The salaries of the local officials were determined by each local. The annual dues of a member was determined by his own Local's By-Laws, subject only to a minimum amount set forth in the International Constitution.

International Constitution which radically altered the internal structure of the Union. The principal contestants were Captain Thomas F. O'Callaghan, the incumbent President and Captain Lloyd F. Sheldon, a former President who was seeking to reclaim the office.

The nominations took place in June and July, 1971. The ballots were mailed to the members on September 21, 1971, and the voting period extended for ninety days thereafter.

The Referendum on Affiliation with the International Longshoremen's Association

For many years the IOMM&P has been engaged in a bitter jurisdictional rivalry with another maritime union, the National Marine Engineers Beneficial Association ("MEBA"). Although, as their respective names indicate, the IOMM&P was organized to represent masters, mates and pilots (deck officers) while the MEBA was organized to represent marine engineers, the MEBA has not been satisfied with this jurisdictional division and has raided the IOMM&P deck officer jurisdiction whenever it could. The MEBA even established a separate division, the Associated Maritime Officers ("AMO") designed to encompass deck officers and to acquire deck officer representation throughout the merchant marine. The battles between the two Organizations are amply, though only partially reflected in the reported decisions.

By 1970 or 1971 Captain O'Callaghan and his fellow officers had become convinced that the IOMM&P could survive only if affiliated with another, larger maritime organization. In this decision they were influenced not only by the escalating jurisdictional rivalry, but by the increasingly close alliance developing between MEBA and one of the major seamen's unions.

After some negotiation, the IOMM&P worked out an agreement of affiliation with the International Longshoremen's Association ("ILA"), a much larger union representing longshoremen, harbor workers, and other waterfront workers. By the early summer of 1971 the affiliation agreement had been completed and signed by the Presidents of ILA and IOMM&P, subject to required Constitutional ratification procedures of both organizations.

The IOMM&P Constitution called for action at the International Convention scheduled for later that same summer, followed by a referendum ratification vote. Under the Constitution, nominations for union office were also to be made at the same Convention. The Convention was held in Galveston, Texas from July 26-30, 1971; and ILA President Thomas W. Gleason addressed the membership in support of the affiliation proposition. At the same Convention, Lloyd F. Sheldon, a former President who was nominated at that Convention as a Presidential can-

didate, spoke in opposition to the affiliation with ILA. His opposition remarks immediately preceded the speech of ILA President Gleason, and Gleason referred to Sheldon's opposition in rather uncomplimentary fashion.

The referendum on the ILA affiliation followed shortly after the favorable Convention action. The ballots were sent out on August 20, 1971. The ballots for the regular election were to be mailed September 21, 1971, about a month later.

The Affiliation Newsletter* (J.A. 109a-116)

On August 19, 1971, in connection with the affiliation referendum, the IOMM&P mailed to the union membership an eight-page newsletter, setting forth the terms of the affilation resolution, reporting on the favorable Convention action, and candidly designed to convince the membership to vote for the proposition. Aware that nothing in the law sterilizes the union leadership from expressing its point of view or from seeking to persuade the members to take action deemed essential to the union's interests, the IOMM&P put out a hard-hitting document detailing the benefits of affiliation and answering the arguments and innuendos, including scurrilous racial slurs, being circulated by the opponents. The pamphlet also noted that much of the opposition was being stimulated, promoted and financed by the MEBA and by MEBA sympathizers (both within and without the ranks of the IOMM&P), who either wished the MM&P to remain

*The Joint Appendix is hereafter referred to as J.A. with page numbers.)

vulnerable to MEBA raids or who preferred affiliation with MEBA to affiliation with ILA.

The newsletter included excerpts from the remarks of ILA President Gleason to the IOMM&P Convention, portions of a speech delivered to the same Convention by John Bowers, the Executive Vice-President of the ILA, and comments in favor of affiliation by the Chairman of the House Merchant Marine and Fisheries Committee, Congressman Edward A. Garmatz.

The newsletter made no reference to the forthcoming union election or to the candidacies of any persons running for union office. There were specific responses to Captain Sheldon's Convention speech in opposition to affiliation, including an excerpt from ILA President Gleason's own Convention speech, made immediately following Sheldon's, criticizing Sheldon's motives. At no point was Sheldon mentioned by name, and the references to him dealt solely with his opposition to the affiliation. Similarly, portions of the excerpted Gleason, Bowers and Garmatz remarks commended Captain O'Callaghan for initiating and supporting the affiliation, but again the scope of the comments was meticulously confined to the subject matter of the newsletter, the ongoing referendum on the vital issue of affiliation with the ILA.

Nowhere did the contents of the newsletter refer directly or indirectly to other candidates for any office, either incumbents or their opponents.

Judge Croake's 1971 Preliminary Injunction (J.A. 1463a-1469a)

On September 16, 1971, about a month after the distribution of the affiliation newsletter and on the eve of the commencement of the 1971 election, Captain Sheldon and two colleagues brought an action to enjoin the election and to compel the union to distribute Sheldon campaign material at union expense.* Sheldon complained not only of the affiliation newsletter but of another publication distributed by the IOMM&P. (J.A. 1492-1539a)

The action was accompanied by a motion for a preliminary injunction. (J.A. 1464a) Judge Croake, to whom the matter was assigned, accepted the motion on affidavits, without holding an evidentiary hearing. Nearly a month later, after the election ballots had been mailed, Judge Croake ruled that the newsletter constituted campaign literature entitling Sheldon to similar union-financed distribution,** ordered that this be done, but refused to enjoin the continuation of the election, noting that he was determining merely a motion for preliminary injunction.(J.A. 1463a-1469a)

*At no time did Sheldon or any other opponent of the affiliation referendum seek either the union mailing lists or other union facilities for distribution of any literature on the affiliation referendum itself. Their sole effort was directed toward the election and the distribution, at union expense, of Sheldon campaign literature. Thus the issue dealt within this Court's opinion in Sheldon v. O'Callaghan, 497 F. 2d 1276 (2d Cir. 1974), cert. den'd, 419 U.S. 1090, does not arise in the present case.

**Judge Croake found that the other publication complained of by plaintiffs did not constitute campaign literature.

Because the election was under way, the union faced the alternative of promptly complying with Judge Croake's Order and thus presumably saving the election, or taking an appeal. The time constraints were such that even an expedited appeal, if unsuccessful, would have delayed matters sufficiently to doom the ongoing election and require a new one. The union chose to comply with Judge Croake's order and immediately mailed Captain Sheldon's literature.

The election resulted in victory for Captain O'Callaghan. His rival appealed to the Secretary of Labor, and this action followed.

The 1974 Election

By 1974 the Secretary's lawsuit had not yet come to trial. In accordance with the requirements of its Constitution, and starting in June 1974, the IOMM&P proceeded to the nomination and election of its three International officers and all of its Offshore Division Officers. Captain O'Callaghan stood for reelection; he was opposed by five other candidates. The two other incumbent International Officials were opposed by five candidates. There were 106 candidates for 36 Offshore Division offices on the Atlantic, Pacific and Gulf coasts. (J.A.2062a-2114a) The election for the Offshore Division offices was completed at the end of December 1974 and early in January 1975 and these officials took office. The results of the election in the Off-

shore Division were unprecedented in the history of the Union. Two-third of the incumbent Offshore Division Port Agents were defeated and in some of the ports, the defeat of the incumbent Port Agent and Assistant Port Agents was even more striking. In the Port of New York for example, where there are six elective offices, only one incumbent survived the election. However, under the Union's Constitution, the three International officials must receive at least 40% of the votes cast in order to win outright. Only the International Secretary-Treasurer achieved this percentage. O'Callaghan and the incumbent International Executive Vice President, Caldwell, did not and accordingly a run-off ensued between the two top candidates for the International President's Office, Captains Scavo and O'Callaghan and the two top candidates for International Executive Vice-President's office, Captains Caldwell and Johnson. The run-off election ended in June 1975 and Captain Scavo won by a vote of 3176 to 2381 and Captain Johnson won by a vote of 3293 to 2231. Captain Scavo and Captain Johnson were thereupon installed in office and have been serving since then. If allowed to serve their full Constitutional term, they would, along with the International Secretary-Treasurer and all of the Offshore Division officers remain in office until the Fall of 1977.

After the completion of the 1974-1975 election, it was challenged by one of the Union's members who argued the invalidity of the Union's Constitutional provision making the three duly

elected International officials the responsible Executive and Fiscal Officers of the Union's Offshore Division. Solely on this basis, the Secretary of Labor filed a challenge to the 1974 election. The same issue raised by the Secretary in its challenge to the 1974-1975 election was briefly referred to by the Secretary in its motion for Summary Judgment in the 1971 election case. The Court below did not decide that issue as part of its Summary Judgment and, without explanation, dismissed the Secretary's challenge to the 1974-1975 election as moot in view of its ruling on the 1971 election. (J.A. 2890a)

The Decision Below (J.A.2860a-2894a)

As indicated above, the motion for summary judgment preceded the run-off election, but the decision was rendered after the election had been concluded and Captain Scavo installed as President.

Judge McKay held that the 1971 candidates had exhausted their union remedies, by timely complaint to the union and then to the Secretary, and that summary judgment, if otherwise jus-

tified, was an appropriate procedure under Title IV of the LMRDA.*

Although the Secretary predicated his motion on several alleged infirmities in the 1971 election (not all of which applied to the contests for the principal international offices), the Court rested its finding of violation exclusively on the newsletter dealing with the ILA affiliation referendum. In but a single sentence of its opinion, with no discussion of either the nature or context of the newsletter, the Court stated:

> "This court, in examining the Newsletter itself, and considering the context in which it was distributed, concurs in the opinion of Judge Croake that the Newsletter constitutes campaign literature distributed in violation of 29 U.S.C. §481."

Judge Motley also concluded, however, that Judge Croake's preliminary injunction order was collateral estoppel on this point and that the issue was, therefore, no longer open to independent determination.

The District Court apparently also believed that factual inquiry into the question of mootness was foreclosed by the Supreme Court decision in Wirtz v. Local 153, Glass Bottle Blowers, 389 U.S. 463 (1968). Although in that case, incumbent officials had won the subsequent election in which illegal eligibility requirements were continued, and the Supreme Court had stressed the unwarranted advantage accruing from a term of

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*No appeal is taken from these portions of the decision below.

of incumbency to those officials after a tainted election, the Court below regarded the factual distinction as immaterial and the need for a supervised election before the next regularly scheduled election as paramount. The Court stated that the tainted 1971 election may have prevented others from gaining the advantage of incumbency, may have induced others to withhold their candidacies in 1974 while awaiting a supervised election, and may have led to a host of different decisions in the intervening three years that in turn may have influenced the 1974 election results.

In failing to decide the single issue raised by the Secretary in its challenge to the 1974-1975 election, the District Court left unanswered critical questions as to the validity of union constitutional provisions bearing directly on the structure of the union government. The IOMM&P comprises three functional divisions, the Offshore Division, the Inland Division, and the Pilots Division. To overcome the abuses of fragmented and often conflicting power blocs and to centralize both authority and responsibility in the national officers elected by the entire membership, the Constitutions of the International and its Divisions provide that the three principal International officers shall also serve as executive officers of the three Divisions and members of the Division Executive Boards. Although they comprise but a small minority of the Offshore Division Executive

Board (three of seventeen), the Secretary has challenged the validity of this entire constitutional structure as applied to that Division. The decision below simply and without explanation declared that issue moot and thus offers no guidance on the resolution of that issue. The union is thus forced into a supervised election without any determination as to the validity of the government constitutional framework.

POINT I

A. THE COURT BELOW ERRED IN HOLDING THAT THE AFFILIATION NEWSLETTER CONSTITUTED PROHIBITED CAMPAIGN LITERATURE

B. THE COURT BELOW ERRED IN HOLDING JUDGE CROAKE'S PRELIMINARY INJUNCTION DECISION ON THE "CAMPAIGN LITERATURE" ISSUE TO BE COLLATERAL ESTOPPEL

The Court Below erred in Holding that the Affiliation Newsletter Constituted Prohibited Campaign Literature

There were four affidavits* filed by the defendant-appellant in opposition to the Secretary's motion for Summary Judgment. The decision by the Court below, granting Summary

*(J.A.1774a-1856a)

Judgment without trial or any hearing, accordingly holds that even if the defendant proved all of the facts and circumstances set forth in those affidavits, the Affiliation Newsletter would nevertheless be campaign literature in violation of 29 U.S.C. §481(g). The facts, relevant to the Affiliation Newsletter, and set forth in those affidavits are as follows.

The IOMM&P held its 60th Convention during the period July 26-28, 1971 in Galveston, Texas. Many things were on the agenda for that Convention, among which was a proposed resolution for the affiliation of the IOMM&P with the International Longshoremen's Association. (J.A.1781a-1784a) Such resolution came about after many months of preliminary discussions between the two unions, preliminary approval by the AFL-CIO Executive Council, and many other ground work steps. The resolution, adopted by the Convention was to be submitted to a referendum vote of all of the IOMM&P membership. (J.A. 1738a)

The IOMM&P Constitution required passage of the resolution by a two-thirds majority of the delegates at a duly convened convention. (J.A. 1336a) The resolution submitted to the Convention was an Agreement of Affiliation which had been completed and signed by the Presidents of the International Longshoremen's Association and the IOMM&P in the early Summer of 1971. As indicated at pages 8 and 9 supra, the affiliation represented action by the IOMM&P to protect its jurisdiction and to protect its hard-won collective bargaining standards. The decision was

a difficult one for the IOMM&P for a large variety of reasons. Although the need for the affiliation was apparent to the officials involved in the day to day operation of the IOMM&P, it presented many problems, emotional and otherwise for the IOMM&P membership. The affiliation vote clearly reflected that the entire issue was not a popular one and that this momentous decision was approved only after enormous effort. The affiliation amendment eventually passed by a vote of 2595 to 2296. (J.A. 1784a)

The President of the International Longshoremen's Association, AFL-CIO, Thomas W. Gleason, addressed the delegates and spoke strongly in favor of that affiliation. His speech was made in response to a speech made by Captain Sheldon who spoke directly in opposition to this issue and had been campaigning vigorously to defeat affiliation. (J.A. 1836a-1837a)

Gleason's speech was directed solely to the issue of affiliation and did not deal with the forthcoming election for the IOMM&P. (J.A. 1834a) His remarks were not discussed in advance with the incumbent officials of the IOMM&P nor were they dictated in any way by the IOMM&P. (J.A. 1834a) Several sentences in President Gleason's address to the Convention were directed to Captain Sheldon. President Gleason's words were strong and angry and "they came from my heart." (J.A. 1834a) There had been a great deal of literature distributed by the groups with which Captain Sheldon was politically aligned and which Captain Sheldon embraced. Much of the literature was

blatantly racist in content. (J.A. 1834a) The literature which Gleason had seen attempted to play on the racist fears of the members by indicating clearly that if the IOMM&P affiliated with the International Longshoremen's Association, it was likely to become dominated by a black controlled International union. This piece of literature for example which was distributed throughout the south showed Captain O'Callaghan with two black Vice Presidents of the International Longshoremen's Association and was accompanied by obvious and pointed language. (J.A. 1835a) Other literature opposing the MM&P-ILA affiliation and with which Sheldon was involved repeated charges that the ILA wanted to take over the MM&P contracts and pension and welfare funds. In addition, testimony would have been submitted to show that much of the opposition literature was financed by rival labor organizations who at the very time were seeking to raid the IOMM&P and strip it of its jobs and contracts. (J.A. 1835a) It was in this context that President Gleason made the remarks he did at the regularly convened Convention of the IOMM&P in Texas in July 1971.

After the delegates passed the resolution calling for the submission of the affiliation question to membership referendum, a ballot committee to conduct the referendum was elected by the Convention delegates and the American Arbitration Association was designated as the impartial balloting agency to conduct the referendum - - - all of which is required by the IOMM&P

Constitution. (J.A. 1336a) Attendant upon the submission of the ballots to the membership the Affiliation Newsletter, entitled "60th Convention Newsletter on the Resolution of Affiliation of the IOMM&P with the ILA" was sent to all of the union membership. This Newsletter reported on the resolution adopted at the 60th Convention, presented excerpts from statements made at the Convention by President Gleason and otherwise gave background material with respect to steps leading to the affiliation resolution and the importance of such affiliation. (J.A. 1783a;109a-116a) This Affiliation Newsletter was mailed to the membership on August 19, 1971, the day before the affiliation ballots went out. (J.A. 1783a) The ballot on the ILA affiliation was sent out on the very next day, August 20, 1971.

Slightly more than a month elapsed before the balloting for the election commenced. Those ballots were mailed on September 21, 1971. (J.A. 1785a)

Despite all of the foregoing, the Court below made short shrift of the Affiliation Newsletter. The Court stated simply:

> "This court, in examining the Newsletter itself, and considering the context in which it was distributed, concurs in the opinion of Judge Croake that the Newsletter constitutes campaign literature distributed in violation of 29 U.S.C. §481."

Whatever else it is, the Affiliation Newsletter is a new and atypical application of 29 U.S.C. §481. Nevertheless, there has been no citation of any authority by either the Court below nor by the Secretary which supports the proposition that a union publication, issued under the circumstances described above, constitutes prohibited campaign literature. In searching the Opinion of the Court below we find only one case cited which deals with a violation of 29 U.S.C §481. In that case, Hodgson v. Liquor Salesman's Union, Local No. 2 of State of New York, 334 F. Supp. 1369 (1971), aff'd 444 F. 2d 1344 (2d Cir. 1971) discussing that case, in a different but related context, the Court said:

> "...this Court considered union journals published just prior to an election and found them to contain statements designed to promote the candidacy of incumbents in violation of 29 U.S.C. §481." (J.A.2876a)

However, the facts in that case were entirely different. There an election was scheduled for January 1970 and the incumbent President, utilizing the Union's newspaper, published articles in the December and January issues, which were devoted to the support of the re-election of the incumbent officials and the defeat of the opposing slate of candidates.*

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*Even a cursory examination of 29 U.S.C. §481 reveals that all of its subdivisions, (a) through (g), deal with the distribution of literature during an election. At most, these subsections control the distribution of literature distributed in relationship to an election campaign.

Nevertheless, despite the fact that the Secretary is clearly "exploring the periphery", of the statute in this case, the Court below without a hearing, without a trial; without the citation of any other cases; and without reference to any supporting legislative history, held that the Affiliation Newsletter was prohibited campaign literature.

The Court Below erred in Holding Judge Croake's Preliminary Injunction Decision on the "Campaign Literature" issue to be Collateral Estoppel

In Lummus Company v. Commonwealth Oil Refining Co., 297 F. 2d 80, 89 (2d Cir. 1961), this Court recognized

> "the rule that action with respect to a temporary injunction, whether by a trial court or an appellate court, ordinarily is not 'binding on the trial court nor upon either of the parties in considering and determining the merits of the controversy,' Benson Hotel Corp. v. Woods, 168 F.2d 694, 697 (8 Cir. 1948); Walker Memorial Baptist Church, Inc. v. Saunders, 284 N.Y. 462, 474 35 N.E. 42, 47 (1941)..."

The Court below, in holding Judge Croake's preliminary injunction to be collateral estoppel, relied upon Zdanok v. Glidden Company, Durkee Famous Foods Division, 327 F.2d 944 (2d Cir. 1964), cert. denied 377 U.S. 934. In that case, the trial was bifurcated with basic issues of liability tried first, and issues pertaining to individual plaintiffs and their damages

reserved for future trial. The issue of liability was fully tried, the liability decision appealed to this Court and considered in an extensive opinion, and review sought in the United States Supreme Court. It was that determination of liability which was advanced as collateral estoppel in a subsequent action. In upholding the contention, this Court observed that "The Zdanok case was tried in 1960 as fully as the parties wished." (327 F. 2d at 949), and only because of the reservation of the damage issue was the determination technically non-final. In the portion of its opinion quoted by Judge Motley herein, this Court clearly limited its ruling to dispositions which while not technically final "have nevertheless been fully litigated."

Judge Croake's 1971 preliminary injunction was not intended to meet this standard, and in fact did not. Judge Croake held no evidentiary hearing, he decided a preliminary injunction motion on affidavits, and his opinion clearly demonstrates that he viewed his disposition as a typical exercise of interlocutory relief. In no sense was the issue whether the 1971 newsletter constituted prohibited campaign material "fully litigated." And Judge Croake's order was never appealed for the eminently practical reason that to do so would have eliminated any possibility of saving an ongoing election on which the union had already expended tens of thousands of dollars. Instead, notwithstanding its belief that the order was erroneous, the union complied with it as promptly as possible.

In the Lummus Co. case, supra, the Court noted that the applicability of collateral estoppel "turns upon such factors as the nature of the decision(i.e. that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review" (297 F.2d at 89). In that case a proceeding to enjoin an arbitration had been heard and decided, the order appealed to the Court of Appeals for the First Circuit, that Court had issued a "comprehensive opinion reversing the decision below, vacating the injunction and ordering arbitration, and review was sought in the Supreme Court. In the subsequent action, this Court held the First Circuit's determination of arbitrability to be collateral estoppel. In doing so, it noted that under the applicable statute, an issue of arbitrability is fully triable unless no genuine factual issue exists; the standard is thus akin to that in a motion for summary judgment.

As with Zdanok, the contrast between Lummus and the instant case is striking. Here there was no evidentiary hearing at all. Nor is there indication that Judge Croake intended his determination to be conclusive for all subsequent purposes. And nothing in his opinion indicates that he was applying summary judgment standards. On the contrary, he simply decided a preliminary injunction motion on the papers, as courts are entitled to do and as they frequently do in practice.

POINT II

THE DISTRICT COURT ERRED IN ORDERING A NEW SUPERVISED ELECTION TO BE HELD IN 1976, ONLY ONE YEAR PRIOR TO THE NEXT REGULAR ELECTION, AFTER THE INCUMBENT PRESIDENT, THE ALLEGED BENEFICIARY OF THE 1971 AFFILIATION NEWSLETTER, SUFFERED DEFEAT IN THE UNTAINTED 1974-1975 REGULAR ELECTION

In 1968, the Supreme Court decided that a new, regular election during the pendency of a lawsuit challenging the prior election does not necessarily moot the action. Wirtz v. Glass Bottle Blowers, Local 153, 389 U.S. 463 (1968). In that case the Secretary had challenged an eligibility requirement for local office that disqualified a large proportion of the union's membership. Before determination of that challenged a new election was held, under the same eligibility requirements, (See Court of Appeals Opinion 372 F.2d 86; 63 LRRM 2587) and the incumbents were re-elected. After noting the absence of relevant legislative history and the need to accommodate the manifest Congressional intent to assure democratic conduct of union elections while imposing minimal governmental interference with union self-government, the Court emphasized the advantages accruing to incumbents from a tainted term of office and the opportunity thus presented to perpetuate themselves in office. Said the Court (389 U.S. at 474):

> "We cannot agree that the statutory scheme is satisfied by the happenstance intervention of an unsupervised election. The notion that the unlawfulness infecting the challenged election should be considered as washed away by the following election disregards Congress' evident conclusion that only a supervised election could offer assurance that the officers who achieved office as beneficiaries of violations of the Act would not by some means perpetuate their unlawful control in the succeeding election. That conclusion was reached in light of the abuses surfaced by the extensive congressional inquiry showing how incumbents' use of their inherent advantage over potential rank and file challengers established and perpetuated dynastic control of some unions."

The Court also spoke of the "vital public interest in assuring free and democratic union elections" and concluded that "the fact that the union has already conducted another unsupervised election does not deprive of the Secretary of his right" to a supervised election (389 U.S. at 475-476).

Although the Court thus made clear that the mere holding of a second election does not of itself moot the case and that the interests to be served extend beyond the protection of the candidates defeated in the tainted election, the Glass Bottle Blowers opinion does not hold that the initial finding of taint necessarily requires a supervised subsequent election irrespective of supervening events or that factual inquiry into this issue is foreclosed. Nor does the Court's discussion indicate that it was intending to lay down any such per se rule.

The cases following Glass Bottle Blowers have involved similar factual situations. Incumbent beneficiaries of tainted elections have successfully withstood their challengers in unsupervised subsequent elections. Factually, the elements noted in the Supreme Court's Glass Bottle Blowers opinion have been present. The advantages of incumbency have been evidence through the results of the subsequent election. In no case has the incumbent beneficiary of the alleged taint been repudiated and defeated in the next election.*

We recognize that perpetuating incumbents is not the only way that the effects of a tainted election may endure. In some instances, for example, an illegal electoral restriction may persist. In others an atmosphere of coercion may have been

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*The cases subsequent to Glass Bottle Blowers have involved an easing of illegal electoral restrictions but without displacement of the incumbents benefited by the initial illegality, Wirtz v. Hotel, Motel & Club Employees Union, Local 6, 391 U.S. 492 (1968), the effect of invocation of the Secretary's processes upon a union's statutory right to hold an unsupervised remedial election in response to a member's complaint, Hodgson v. Local 400, Bakery & Confectionery Workers Union, 491 F. 2d 1348 (9th Cir. 1974); Hodgson v. Local 1299, Steelworkers, 453 F. 2d 565 (6th Cir. 1971); and perpetuation of incumbents in office through a subsequent unsupervised election in which the original complainant did not run, Wirtz V. Local 1622, Carpenters, 285 F. Supp. 455 (N.D. Calif. 1968). In none of these cases do the facts even remotely approach those at bar.

created which can be dispelled only by government supervision. In still others, incumbents may seek to retire in favor of hand-picked successors. Or they may manipulate a subsequent election in other ways. But here the only vice found was the distribution of a single piece of literature in 1971, and in 1974 the incumbent President who supposedly benefited from that distribution ran and lost. There is not the slightest factual suggestion in this record,or in the opinion below, of any manipulation or corruption in the 1974 election.

In its opinion, the District Court postulated three conceivable ways in which the alleged taint might have continued: first, that the results of the 1971 election prevented others (presumably Sheldon) "from rightfully developing the...benefits of incumbency"; second, that others may have withheld candidacies in 1974, prefering to wait for a supervised election;* and, third, that between 1971 and 1974, the day to day decisions in the union might have been different and these differences may have led to different results in 1974.

These speculations are unsupported by anything in the

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* This is hard to believe in view of the number of candidates for office in the 1974 election. There were 13 candidates for the three International offices and 106 candidates for the 36 Offshore Division Offices.

record. They are merely another way of stating a per se rule under which nothing that happens after a tainted election can ever affect the necessity of a supervised new election. For it is simply a truism to state that if an election is tainted, there might have conceivably been other victors and this might have yielded different day to day decisions. Nor is there any logical way to dispute the hypothetical speculation that some unknown union member might have withheld his candidacy while awaiting a supervised election. There is, of course, not a scintilla of evidence that this occurred, but if a supervised election is to be required on the basis of this kind of gossamer, then no supervening event, no matter how decisive and conclusive, will suffice to avoid it.

We recognize that in the great majority of cases, the considerations cited in Glass Bottle Blowers and the cases following it will be controlling and a supervised election will be required, notwithstanding an intervening unsupervised election. But this case, we submit, falls within the small area of exception. At the very least, the defeat of the incumbent President O'Callaghan*

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*As indicated at pages 13-14 supra, the results of the 1974-1975 election, in terms of the defeat of incumbents, were unprecedented in the history of the Union. Two of the three incumbent International officials were defeated (incumbent President O'Callaghan and Executive Vice President Caldwell); two-thirds of the incumbent Offshore Division Port Agents were defeated and in some of the ports the defeat of the other incumbents, i.e., Assistant Port Agents was even more striking. In the Port of New York for example, where there were six elective offices, only one incumbent survived the election.

who was the claimed beneficiary of the 1971 literature requires further factual inquiry and the denial of summary judgment.

There is always a point at which general language in judicial opinions can be stretched to the point where it becomes ludicrous. Here, the spectacle of a union membership repudiating an incumbent, ousting him from office, and then having the Secretary of Labor insist that he be granted an immediate opportunity to regain his position for the sole reason that he may have acquired it wrongfully in the first place, can only yield a sense of wonderment and incredulity. Truly this is a mechanical jurisprudence carried to its zenith.

But even this is not the entire story. As the District Court recognized in footnote 2 of its Opinion, (J.A. 2890a) the constitutional provisions governing IOMM&P elections are currently in a state of limbo. This Court has held that the 1971 Constitution, which recast the entire structure of the union, was not validly ratified. Sheldon v. O'Callaghan, 497 F. 2d 1276 (2d Cir. 1974), cert. den'd, 419 U.S. 1090, aff'd on second appeal, F. 2d (Feb. 26, 1976). Under the remedial procedure decreed by Judge Knapp in that case, the union must present the Constitution for membership ratification vote; and if it is rejected a new Constitutional Convention must be convened to formulate an acceptable substitute. The entire process must be completed within one year after exhaustion of appeals from his order; which brings us into 1977.

Judge Motley's decision below frankly acknowledges that if the new Constitution is rejected (and it was originally appro-

ved in the 1971 vote by a relatively narrow margin), then "yet another election would perhaps be mandated." For reasons which remain unelaborated in the opinion below, Judge Motley characterized this possibility as "far too tenuous to prevent this court from remedying the violations which it finds to have occurred." Inasmuch as the principal practical question below was not whether the next IOMM&P election should be supervised by the Secretary but whether a special election should be required in 1976 instead of awaiting the next regularly scheduled election in 1977, the District Court's conclusory assertion does not meet the real issue. Given the limited nature of the 1971 taint which the Court relief upon and the results of the 1974-1975 election and adding to these factors a basic constitutional uncertainty which might render any special election a nullity but which will be resolved at the latest in 1977 when the next regular election is scheduled, the absurdity in insisting upon plunging forward with a special election in 1976 becomes overwhelming.

The situation becomes particularly incredible in light of the Court's rejection of the union's proposals in its counter-Judgment and Order that such supervision be of the union's next regularly scheduled election just one year away. In all the circumstances, the Secretary's insistence on pressing forward with a 1976 election must be regarded, at least, as a gross abuse of discretion. Inasmuch as nothing in the Act indicates

that the District Court is intended merely to rubber stamp the wishes of the Secretary, the decision below must also be regarded as erroneous.

POINT III

THE COURT BELOW ERRED IN ORDERING A NEW SUPERVISED ELECTION WITHOUT PASSING UPON THE CHALLENGED VALIDITY OF INTERNATIONAL AND OFFSHORE DIVISION CONSTITUTIONAL PROVISIONS ESTABLISHING THE GOVERNING STRUCTURE OF IOMM&P DIVISIONS

The 1971 IOMM&P and Offshore Division Constitutions were designed to end the fragmented allocation of powers and responsibilities within the organization and to permit uniform, consistent administration of the affairs of the union through centralizing power and responsibility in the national officers elected by the entire membership of the union. Toward this end, and also for reasons of fiscal economy, the International and Division Constitutions provide that the International President, Vice-President and Secretary-Treasurer, by virtue of their offices, shall serve as the executive and fiscal officers of the three constituent Divisions as well as members of the Division Executive Councils. In the case of the Offshore Division they constitute three of the seventeen Offshore Division Executive Council members. As elected and salaried International officials they receive no additional compensation for their duties as Division officers, and the IOMM&P as a whole is thus able to

realize substantial, much-needed fiscal savings.

In the present suit, the Secretary of Labor has challenged this structure as violative of the Act.* Because the International officers are elected by all the members of the entire International, members of the Pilots Division, for example, have a say in the selection of the persons who will serve as executive and fiscal officers of the Offshore Division, and this, plaintiff claims, contravenes of the statute.

The Union maintains that the LMRDA does not impose an absolute requirement that each member of a labor organization have a right to vote for all officers who govern that labor organization, nor does it impose an absolute prohibition against any person who is not a member of a particular subordinate organization (but who is a member of the parent organization) participating in the selection of persons to fill prescribed positions in the subordinate organization. See, for example, Fritsch v. Painters, District Council 9, 493 F. 2d 1061 (2d Cir. 1974); cf, American Federation of Musicians v. Wittstein, 379 U.S. 171 (1964). Specifically, we do not read the Act as imposing an ab-

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*Technically, the challenge herein relates only to the Offshore Division, simply because no members has complained about the International officers serving as executive and fiscal officers of the other two Divisions. The thrust of the Secretary's objection, however, extends to the basic structure as it affects all Divisions.

solute prohibition upon duly elected officers of a parent union serving, by virtue of their offices, as officers of a subordinate union.

The provisions of the IOMM&P Constitution do not deprive any Offshore Division member of the right to vote for all Offshore Division officers, nor do the votes of any members count more than the votes of other members. In Gordon v. Laborers, 351 F. Supp. 824 (W.D. Okla. 1972), the Court stated:

> "Thus, not only is there nothing to indicate that Congress intended to impose a system of voting or representation on unions which would undermine their long-established traditions of representative trade union government. In fact, the court concludes that it was the intent of Congress to leave intact such well-established union practices and procedures."

As we read the law, and as the Fritsch opinion and cases cited therein indicate, the test of legality is the reasonableness of the provision in all the circumstances and the factual justification for the structure embodied in the union constitution.

In any event the merits of this point are not before the Court on the present appeal and there is neither factual record nor district court decision to review. That is precisely our complaint. For although the issue of the validity of this constitutionally prescribed structure of union government was squarely presented, the district court did not decide it. At the same time, however, the Court below did order a new 1976 election to be supervised by the Secretary.

Although not reflected in the record, the Secretary's representatives have advised the union that as part of their "supervisory" administration of the new election, they intend to invalidate these constitutional provisions and to require that the Offshore Division elect separate executive and fiscal officers by separate vote.

This leaves the union in a dilemma that directly contravenes the intent and terms of the election provisions of the statute. If the Secretary's representatives follow their announced course, the Secretary on his own will have invalidated important provisions of the union Constitution. He will have done this administratively, without the support of any judicial ruling, and his unilateral administrative action will determine the nature and effect of the election being "supervised" by him.

The Union, for its part, will have no means to effectively challenge the Secretary's determination. At most the IOMM&P could complain to the District Court, but it is by no means clear that the court will undertake to grant pre-election review of each decision made by the Secretary in the course of his supervisory duties. If it did, then its procedures would be summary and its decision would probably be considered interlocutory and non-appealable. The only final appealable order would be the final certification of the results of the election. By then, however, the new officers, presumably operating under the structure decreed by the Secretary, would already be functioning.

None of this can be squared with the statutory scheme. The Act contemplates a court action by the Secretary if he believes election procedures to be violative of the Act. The statute provides for a trial of the issues, after usual discovery opportunities, and a trial can be avoided only if the standards of summary judgment are met, as in any plenary federal civil action. Not until final judgment are the election results to be disturbed, and that judgment is immediately appealable. It is the court's decision that establishes the guidelines as to which challenged union rules and procedures are valid and which are invalid. Contrast this with an administrative "supervisory" invalidation of the basic governmental structure embodied in a union Constitution.

We readily acknowledge that not every alleged election taint need be ruled upon by a district court. If several pieces of campaign literature are challenged or if the ballot count is attacked, it is enough to find at least some material taint sufficient to change the result. The reason why a court need not pass upon other challenges of this nature is that it can be assumed that the same piece of literature will not again be distributed, the same ballot markings and ballot challenges will not repeat themselves, and the same ballot count will not recur, particularly in a supervised election.

Where, however, the challenge relates to the validity of a union constitutional provision, the court must pass on it,

for the same issue will necessarily arise in the next election. And nothing in the Secretary's supervision will prevent its recurrence.

The district court may not relinquish the determination of claimed infirmities in a union constitution to the "supervisory" discretion of the Secretary. The statute casts the responsibility for such decisions on the courts, not the Secretary of Labor. By failing to decide this issue and allowing the Secretary, even for an interim period before ultimate judicial review, to effectively amend and restructure the union Constitution, the court below committed reversible error.

CONCLUSION

For the reasons stated, the Judgment and Order below should be vacated and the case dismissed. If the Court determines that there are insufficient reasons to dismiss the case, the Judgment and Order should be vacated and the case remanded for trial. Or, if the Court determines that despite all of the reasons stated, a supervised election is still necessary, the

Judgment and Order below shall be amended to provide that the Secretary shall supervise the next regular triennial election commencing June 1977.

Dated: May 21, 1976
New York, N.Y.

Respectfully submitted,

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Service of three (3) copies of the within is admitted this 25th day of May 1976

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